Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER.

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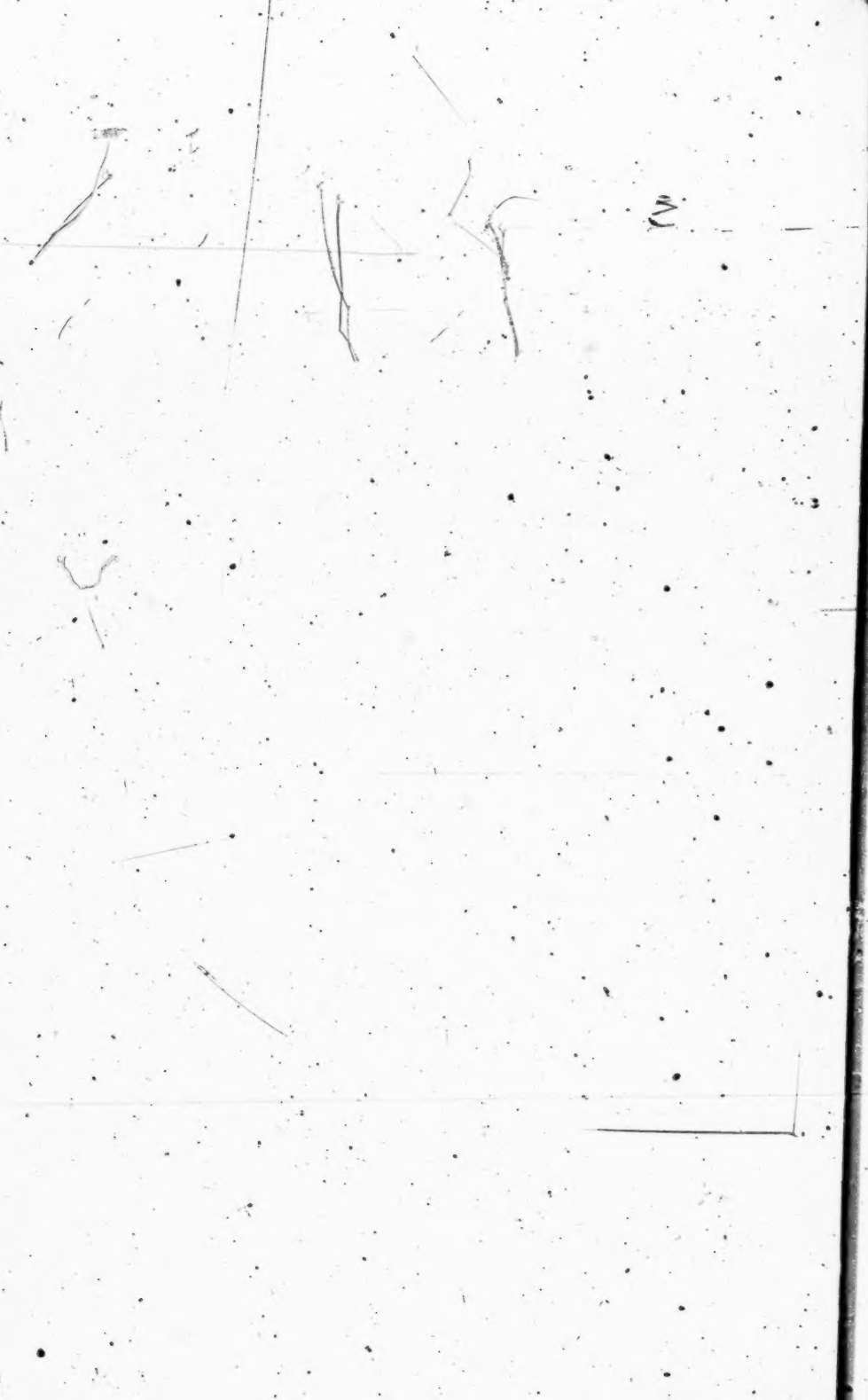

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Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

The jurisdiction of the Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C. Sec. 347 (A)). Certiorari was granted June 7, 1943.[1]

[1] 87 L. Ed. 1167.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates upon the Democratic ticket for the offices of United States Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th and 17th Amendments of the United States Constitution (R. 4-16).[1] The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in Texas was "a political party affair" and, therefore, not subject to federal control (R. 59-71). The parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. KENNERLY filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment: (1) that the peti-

[1] Jurisdiction of the federal courts is invoked under Sections 41 (11), 41 (14) and 400 of Title 28 of the United States Code.

tioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom, and usage of which plaintiff [petitioner here] and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents of and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic Party and, as found by the district judge, is a Democrat (R. 81). Petitioner has never voted for any other candidates than those of the Democratic Party in any general election at all times material to this case; has been and is ready and willing to take the pledge of persons voting in the Democratic Primary (R. 71, 81).

A primary and a "run off" primary were held in Harris County, Texas, on July 27, 1940 and August 24, 1940, for nomination of candidates upon the Democratic ticket for the

offices of United States Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner with his poll tax receipt presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct and requested to be permitted to vote. Respondents refused him a ballot solely because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article 2955 of the Revised Civil Statutes of Texas. This statute prescribes identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Direct primary elections in Texas were created and are required and controlled in minute detail by an intricate statutory scheme.[1]

According to the stipulations of facts made a part of the Findings of Facts of the District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

[1] The present election laws of Texas originated with the so-called "Terrell Law", being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82-107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C heretofore filed.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D heretofore filed.

The Democratic Party in Texas.

The Democratic Party is the only party in Texas required by law to hold primary elections (R. 72). The Democratic Party in Texas is a voluntary association of individuals without any rules or procedure for becoming a member (R. 119). There is no constitution, nor are there by-laws or fixed rules for the Democratic Party (R. 133, 146). It is admittedly run in a "slip-shod" manner (R. 146). There are no permanent records (R. 131). There are no fixed rules for the "government of the affairs of the Party" other than the election laws of the State of Texas (R. 133-134). The policy of the party is dictated by the conventions held every two years. There are no permanent officers of the party (R. 125). Officers of the convention are elected at each convention and their duties end at the adjournment of the convention (R. 146).

Every two years primary elections are held pursuant to the elections laws of the State of Texas (R. 131-132). In the holding of these elections the laws of Texas are followed (R. 131). There are no rules for holding these elections other than the election laws of Texas (R. 133-134). At these primary elections any white elector, regardless of party affiliation, is permitted to vote (R. 106, 81).

After the elections are held the successful candidates are certified to the Secretary of State of Texas (R. 128). This likewise is done pursuant to and by virtue of the election laws of Texas (R. 128).

Expenses of the Primary.

The County Clerk, the Tax Assessor and Collector, the County Judge of Harris County all performed their duties under Articles 3100-3153, Revised Civil Statutes of Texas,

in connection with holding of the primaries on July 27, 1940, and August 24, 1940, without cost to the candidates or the Democratic Party or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination were certified by the County Executive Committee, and the State Executive Committee, in turn, certified such nominees to the Secretary of State who placed the names of such candidates on the General Election Ballot to be voted on in the general election. All services rendered in this connection by the Secretary of State were paid for by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee, it is admitted: "... that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned prorata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee following the assessment so levied" (R. 76).

Errors Relied Upon.

The question presented by the Petition for Certiorari heretofore granted was:

> *"Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of Federal officers?"*

The Circuit Court of Appeals erred in affirming the judgment of the trial court denying petitioner relief and

issuing a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom and usage, of which plaintiff [petitioner here] and other Negro citizens are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed for the following reasons:

I.

THE CONSTITUTION AND LAWS OF THE UNITED STATES AS CONSTRUED IN UNITED STATES v. CLASSIC PROHIBIT INTERFERENCE BY RESPONDENTS WITH PETITIONER'S RIGHT TO VOTE IN TEXAS DEMOCRATIC PRIMARIES.

A. THE RATIONALE OF THE CLASSIC CASE COVERS A CIVIL ACTION FOR DENIAL OF THE RIGHT TO VOTE IN A LOUISIANA PRIMARY ELECTION BECAUSE OF RACE OR COLOR.

B. THERE IS NO ESSENTIAL DIFFERENCE BETWEEN THE STATUS OF PRIMARY ELECTIONS IN LOUISIANA AND IN TEXAS.

(1) Texas like Louisiana has made primary elections "an integral part of the procedure of choice".

(2) In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.

C. THE RESPONDENTS HERE ARE SUBJECT TO THE CONTROLLING FEDERAL STATUTES.

II.

THE ACTION OF RESPONDENTS HEREIN WAS IN VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

A. THE CONDUCT OF RESPONDENTS IN DENYING PETITIONER A BALLOT TO VOTE IN THE TEXAS DEMOCRATIC PRIMARY WAS STATE ACTION.

B. NEW MATTER DISCLOSED IN THE PRESENT RECORD DESTROYS THE FACTUAL BASIS FOR THE DECISION IN GROVEY V. TOWNSEND.

ARGUMENT.

I.

The Constitution and laws of the United States as construed in *United States v. Classic* prohibit interference by respondents with petitioner's right to vote in Texas Democratic primaries.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article 1 and the Seventeenth Amendment of the Constitution of the United States (R. 4-5).[1] The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner

[1] Jurisdiction of the District Court was invoked under sub-divisions 11 and 14 of Section 41 and Section 400 of Title 28 of the United States Code (R. 4-5).

and other qualified electors to vote in the Democratic primary elections held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. These rulings are inconsistent with the decision of this Court in *United States* v. *Classic*.[1]

A. The rationale of the *Classic* case applies to a civil action for denial of the right to vote because of race or color in a Louisiana primary election.

In *United States* v. *Classic, supra,* all of the Justices agreed that the right to vote in a direct primary election which the State has made an integral part of the procedure of choice among candidates for Congress or which in fact effectively controls such choice is secured by the Constitution as fully as is the right to vote in a general election.[2]

The majority of the Court then concluded that the criminal sanctions of Sections 19 and 20 of the Criminal Code in terms directed at "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and the laws of the United States" were applicable to the deprivation of the right of a voter to have his ballot counted in such a primary election.

It necessarily follows that the defendants, *Classic,* and others, were likewise liable civilly to the complaining witness under Section 43 of Title 8 of the United States Code, which is part of the same original Act as Sections 19 and

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[1] 313 U. S. 299 (1941).

[2] Compare statement by HOLMES, J., in *Nixon* v. *Herndon*, 273 U. S. 536, 540 (1927): "If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

20 of the Criminal Code and the language of which closely approximates the language of Section 20.[1]

If the person seeking civil remedy has been debarred from participation in the primary because of race or color, he need not rely upon the general language of Section 43 alone because the act complained of is expressly prohibited by Section 31 of Title 8 of the United States Code, under the heading "Race, color or previous condition not to affect right to vote", which provides as follows:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the

[1] After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men. The second Civil Rights legislation (16 Stat. 140; *id.* 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third Civil Rights Act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of Title 18 (Section 20 of the Criminal Code) of the United States Code are both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

Sec. 43 of Title 8	Sec. 20 of Criminal Code
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."	"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510, Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S. sec. 2004."

The dissenting Justices in the *Classic* case were of opinion that Section 20 as a criminal statute should be given a restrictive construction which would exclude frauds in primary elections from the wrongs embraced by that section. However, the allowance of a civil remedy is not impeded by the special restrictive canons of construction which are peculiarly applicable to criminal statutes. Indeed, Section 43 of Title 8 has been used repeatedly to enforce the right of the citizen to vote without discrimination because of race or color.[1]

This problem of statutory construction is obviated altogether by Section 31 of Title 8, *supra*, since it is directed at the very wrong now under consideration; namely, the denial of the right to vote at any election because of race or color.

Once a primary becomes an election within the purview of federal authority, Sections 31 and 43 of Title 8 provide the voter with a civil remedy calculated to protect his right to vote in such primary election without distinction because of race or color. It follows that if the present petitioner were a Negro citizen of Louisiana complaining of acts in that State identical with those which occurred in Texas, he would have a cause of action under the doctrine of this Court in *United States* v. *Classic*, *supra*.

[1] See *Myers* v. *Anderson*, 238 U. S. 368 (1915); *Lane* v. *Wilson*, 307 U. S. 268 (1939).

B. There is no essential difference between primary elections in Louisiana and in Texas.

A comparison of primary elections and primary election laws in Texas with primary elections and primary election laws in Louisiana, demonstrates that in Texas, as in Louisiana, "the state law has made the primary an integral part of the procedure of choice [and that] . . . in fact the primary effectively controls the choice".[1]

1. *Texas like Louisiana has made primary elections "an integral part of the procedure of choice".*

In *United States* v. *Classic*, this Court decided that a direct primary election is subject to federal control under Article I "where the state law has made the primary an integral part of the procedure of choice".[2] The Court pointed out that these constitutional provisions do not cease to be applicable when a state "changes the mode of choice from a single step, a general election to two, the first of which is a choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election".[3] In another formulation of the same principle the Court said "that the authority of Congress . . . includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress".[4] To determine the applicability of the stated principle in the *Classic* case, this Court considered the statutes of Louisiana concerning direct primary elections. While the Court did not in terms indicate which statutory pro-

[1] *United States* v. *Classic*, 313 U. S. at p. 318.
[2] 313 U. S. at p. 318.
[3] 313 U. S. at pp. 316-317.
[4] 313 U. S. at p. 317.

visions were of greatest significance in establishing the primary as part of the procedure of choice, the opinion does specify the two decisive types of state action from which this consequence had resulted; namely, (1) "setting up machinery for the effective choice of party candidates"; and, (2) eliminating or seriously restricting "the candidacy at the general election of all those who are defeated at the primary".[1]

Comparison of the Texas and Louisiana statutes demonstrates that the legislatures of both states have taken the same type of action.[2]

In Louisiana all political parties casting five per cent. or more of the total votes at the preceding elections are required to nominate by direct primary election (Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3). In Texas all political parties casting 100,000 or more votes at the last general election are required by statute to nominate by direct primary election. (Vernon's Revised Civil Statutes, Article 3101.) It is agreed by both parties that: "At all times material herein the only state-wide primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

Texas eliminates or restricts the candidacy of persons other than primary victors to a greater extent than does Louisiana. The Texas law provides restrictions equivalent to those in Louisiana.[3] In addition the Texas law requires

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[1] 313 U. S. at p. 311.

[2] See Comparative Tables of Louisiana and Texas election statutes in Petitioner's Appendices filed herein under separate cover.

[3] Candidacy at the general election by means of independent nominating petition is restricted by the pledge required by statute of all persons participating in primary elections and the further statutory provision that persons participating in primary elections in which a candidate is chosen for office may not sign a petition in favor of another's nomination to said office (Article 3160).

that all party or organization candidates for Senator must be chosen at a primary election, and goes so far in making this restriction explicit as to preclude any candidates defeated in a senatorial primary from running as an independent or non-partisan candidate in the general election.[1]

It is submitted that the foregoing are controlling factors sufficient in themselves to make a primary election an integral part of "the procedure of choice". Other statutory provisions may be relevant but they are not decisive. A large number of such subsidiary items appearing in both the Texas and Louisiana statutes are assembled for the purpose of comparison in parallel columns in Petitioner's Appendices. Only one of these cumulative circumstances appears in the Louisiana statutes but not in the Texas statutes. In Louisiana the State collects a fee from all candidates participating in primary elections and thereafter conducts the primary at its own expense, while in Texas, the statutes require the payment of certain prescribed fees by candidates to the Executive Committees of the Democratic Party to be used for the purpose of paying certain of the expenses of said primary.[2] In Texas many of the expenses of the primary are paid in their entirety and directly by the

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[1] Vernon's Revised Civil Statutes of Texas, Arts. 3090, 3096.

[2] These funds contributed by candidates are considered a trust fund solely for the purpose of paying of certain expenses for the primary election and cannot either be appropriated by the Democratic party or used for any purpose other than those purposes specifically set out in the primary election statutes. *Kaufman et al.* v. *Parker*, 99 S. W. (2d) 1074 (1936); *Small* v. *Parker*, 119 S. W. (2d) 609 (1938).

state.[1] However, this factor, in the Texas scheme does not make the primary either more or less a part of the procedure of choice. It does not change the effectiveness of the primary in eliminating candidates, nor does it make primaries more or less mandatory or more or less completely defined by law. Thus tested by the criteria set up by this Court in the *Classic* case, this factor is in no sense controlling.

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[1] Pursuant to Article 2975 of the Revised Statutes of Texas the County Collector of Taxes of Harris County, Texas, prepared a list of qualified voters of said county who paid their poll tax prior to January 31, 1940. Pursuant to Article 3121 of the Revised Statutes of Texas, the County Collector for Harris County, Texas, delivered a copy of this list to the defendants in their official capacities as Judges of Primary Elections, to be used by them in determining the qualifications of voters in said primary election. The expenses for the listing of qualified electors and the furnishing of these lists in the primary elections are paid for by the State of Texas and Harris County; pursuant to statute as follows:

> "The tax collector shall be paid fifteen cents for each poll tax receipt and certificate of exemption issued by him to be paid *pro rata* by the State and County in proportion to the amount of poll tax received by each, which amount shall include his compensation for administering oaths, furnishing lists of qualified voters in election precincts for use in all general and primary elections and primary conventions where desired. . . ." (Article 2994.)

Pursuant to Article 3120 of the Revised Statutes of Texas, voting booths, ballot boxes, and guard rails prepared for general elections may be used for primary elections.

Pursuant to Article 2956 of the Revised Statutes of Texas, the County Clerk of Harris County, Texas, is authorized and required to receive absentee ballots for voting in the primary elections.

Pursuant to Article 3128 of the Revised Statutes of Texas, the County Clerk is required to cause the names of the candidates who have been nominated to be printed in some newspaper published in the County and to post a list of such names in at least five public places in the county, one of which shall be upon the courthouse door.

2. *In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.*

In *United States* v. *Classic, supra,* this Court decided that "where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary" is protected by the Constitution. In that case, an allegation that selection in the Democratic primary in Louisiana was decisive of election to Congress was admitted by demurrer to the indictment.

In the present case, it was alleged by the petitioner in his complaint and demonstrated by a summary of election statistics appended thereto that nominees of the Democratic Party have been elected in all major elections in Texas with but two exceptions since 1859 (R. 9, 29-59). Thereafter, by stipulation of the parties duly incorporated in the trial record, it was established as a fact that "since 1859 all Democratic nominees for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72). In his trial findings the District Judge stated that "the facts in detail have been stipulated, but it seems only necessary to refer to the Stipulations and to make them a part thereof" (R. 81).[1]

As a matter of fact, in 1940 when petitioner tried to vote the only opportunity for any Texas voter to exercise his choice for United States Senator was in the Democratic

[1] The full import of this is made clearer upon consideration of the fact that during this period two senators have been elected each six years, 21 members of United States House of Representatives have been elected every two years, and a governor elected every two years. The fact that during this period of more than eighty years there have only been two instances of election of candidates other than those of the Democratic Party demonstrates clearly that nomination at the Democratic primary in Texas is tantamount to election.

primary election. It was the only primary election held in 1940 (R. 72). The figures for the 1940 general election in Texas show the following vote for United States Senator: Democrat 978,095 and Republican 59,340.[1]

The Texas Court of Civil Appeals has pointed out that it is "a matter of common knowledge in this state that a Democratic primary election, held in accordance with our statutes, is virtually decisive of the question as to who shall be elected at the general election".[2]

It is adequately established in this record that in Texas, as was the case in Louisiana, the Democratic primary in fact "effectively controls the choice". The legal consequence of this, under the *Classic* case, is that the right to vote in Texas primary elections is secured by the Constitution.

C. The respondents herein are subject to the controlling federal statutes.

Section 31 of Title 8 of the United States Code declares the federal right of otherwise qualified electors to vote at

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[1] Congressional Directory (1943), p. 250.

[2] *State* v. *Meharg*, 287 S. W. 670, 672 (1926). One of the major reasons for the development of the primary election was that in "the South, where nomination by the dominant party meant election, it was obvious that the will of the electorate would not be expressed at all, unless it was expressed at the primary". CHARLES EVANS HUGHES, *The Fate of the Direct Primary*, 10 National Municipal Review, 23, 24. See also: HASBROUCK, *Party Government in the House of Representatives* (1927), 172, 176, 177; MERRIAM and OVERACKER, *Primary Elections* (1928), 267-269.

On the great decrease in the vote cast in the general election from that cast at the primary in the "one-party" areas of the country, see GEORGE C. STONEY, *Suffrage in the South*, 29 Survey Graphic 163, 164 (1940). In Louisiana there were 540,370 ballots cast in the 1936 Congressional primaries, as against 329,685 in the general election. In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

all elections without distinction of race or color.[1] It is admitted that respondents prevented petitioner from voting because of his race and color. Sub-division 11 of Section 41 of Title 28 of the United States Code[2] gives the District Court jurisdiction of all suits to enforce rights of citizens of the United States to vote in the several states.[3] Similarly Section 400 of Title 28 conferring jurisdiction over proceedings for a declaratory judgment contains no limitation significant for present purposes as to the person against whom such proceedings may be brought. Thus it is necessary only that the petitioner show that the respondents are persons who have in fact infringed the right which he asserts, and it is not necessary that he shows that respondents acted under color of any state law.

It is only under Section 43 of Title 8 and under Subdivision 14 of Section 41 of Title 28 that a question arises whether the respondents acted "under color of any statute, ordinance, regulation, custom, or usage of any state". The

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[1] See: *Guinn* v. *United States*, 238 U. S. 347 (1915); *Myers* v. *Anderson* (*supra*); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Nixon* v. *Condon*, 286 U. S. 73 (1932).

[2] "The district courts shall have original jurisdiction. . . .

"Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States."

[3] Section 31 of Title 8 is codified from Section 1 of the Act of May 31, 1870 (16 Stat. 140) which was amended by the Act of February 28, 1871 (16 Stat. 433). Section 15 of this amended statute provided that the Circuit Courts of the United States should have jurisdiction of all cases in law and equity arising under the original and amended acts. By Act of March 7, 1911 (36 Stat. 1092) the jurisdiction over these actions was transferred to the District Courts of the United States. This section has now become Section 41 (11) of Title 28 of the United States Code.

facts show that they did so act. It is the State of Texas which, by its election laws, creates, requires, regulates and controls the direct primary election as an integral part of the election machinery in that state. It is the statutes of Texas which require the appointment of primary election judges and prescribe the qualifications and disqualifications for such office, which are the same as the qualifications and disqualifications for judges of general elections. (Vernon's Revised Statutes, Articles 3104, 2930, 2940.) The statutes of Texas prescribe in minute detail the powers of primary election judges, which are likewise the same as those of general election judges. Specifically, respondents as such primary election judges were under statutory mandate to administer oaths, to preserve order, and to appoint special officers to assist in the maintenance of order (Art. 3105). They were required to compel the observance of the law prohibiting loitering and electioneering near the polling places and to arrest any person engaged in conveying voters to the polls in carriages or other conveyances except as permitted by statute (Art. 3105). All of these significant police powers of the respondents as election judges are derived solely from and exercised under the sovereign authority of the State of Texas. It is particularly significant that respondents as election judges are required by Article 3104 of the Revised Civil Statutes of Texas to take an oath which is the same oath that is required of officials serving in general elections and, moreover, Articles 217 and 231 of the Penal Code of the State of Texas make it a criminal offense subject to fine for any election judge to refuse to deliver a ballot to or receive the vote of a qualified elector in a primary election.

It is the usual procedure in Harris County, Texas, for the same individuals who are appointed election judges in the general elections also to serve as election judges in

the Democratic primary elections (R. 74). The respondents conducted the Democratic primary elections of 1940 in the same manner as the general elections and in conformance with the statutes of the State of Texas (R. 74, 103-108).

With their offices thus created and defined by the State and with their duty to receive and count ballots imposed by statute, respondents so exercised their official function under the laws of Texas as to deny petitioner the right to vote. Thus the action of which petitioner complains comes squarely within the test of action under color of state law as formulated in *United States* v. *Classic*: "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law".[1] Respondents "possessed" their "power . . . by virtue of state law" and their rejection of the petitioner's ballot was "made possible only because [they were] clothed with the authority of state law". Controlling effect should be given here as in the *Classic* case, to the relationship of the State to the enterprise in which the primary election judges were engaged. Once the state's relationship to the enterprise in which the offending persons are engaged is established, it is immaterial what sanction, if any, is claimed for a particular act done in performing an official function. Indeed,

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[1] 313 U. S. at 326.

Cf. *Ex Parte Virginia*, 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 469, 507, 519 (1939).

if the matter of such sanction were controlling, the Court would necessarily have concluded in the *Classic* case that the alleged election frauds were not "under color of" state law because they were not authorized by the State.[1]

It is submitted that this reasoning should have been but was not adopted when the status of Texas primary elections was considered by this Court in *Grovey* v. *Townsend*.[2] In that case, the conduct of election judges was considered to be private rather than State action because the act complained of—the exclusion of Negroes from voting—was not authorized by the State. Under the correct approach of the *Classic* case, authority for the particular act is immaterial so long as the relationship of the State to the enterprise in which the election judges are engaged is such as to bring their whole course of official conduct "under color of state law". This conflict between the theories of *United States* v. *Classic* and *Grovey* v. *Townsend* should now be resolved in accordance with the sound reasoning of the *Classic* case.

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[1] In an unbroken line of decisions this Court has held that an officer of a state finds no shield from enforcement of federal constitutional and statutory limitations in the fact that the state law did not authorize the acts complained of. Even prohibition of misconduct by state statute does not operate to limit the federal authority to enforce constitutional restrictions as against state officers. See: *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907); *Siler* v. *Louisville and Nashville R. R.*, 213 U. S. 175 (1909); *Des Moines* v. *Des Moines City Ry.*, 214 U. S. 179 (1909); *Home Telephone and Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931). These cases must be taken as overruling the earlier and inconsistent *Barney* v. *City of New York*, 193 U. S. 430 (1904).

[2] 295 U. S. 45 (1935).

II.

The action of respondents herein was in violation of the Fourteenth and Fifteenth Amendments.

The refusal of the respondents to permit petitioner to vote in the Democratic primary in Texas because of race or color also violated the Fourteenth and Fifteenth Amendments to the Constitution of the United States. In the State of Texas, where the state law has made the primary an integral part of the procedure of choice and where in fact the primary effectively controls the choice, the prohibitions of the Fourteenth and Fifteenth Amendments apply to primary elections to the same extent as in the case of general elections.

A. The conduct of respondents in denying petitioner a ballot to vote in the Texas Democratic primary was state action.

In the *Classic* case this Court indicated that in primaries which are an integral part of the election machinery of a state the protection afforded by the Fourteenth Amendment to Negro voters is even clearer than the more generalized protection of Article I. Interpreting Section 19 of the Criminal Code the Court stated: "It does not avail to attempt to distinguish the protection afforded by Sec. 1 of the Civil Rights Act of 1871, 8 U. S. C. A. Sec. 43, to the right to participate in primary as well as general elections, secured to all citizens by the Constitution, . . . on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment".[1]

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[1] 313 U. S. at p. 323.

The action of the respondents herein in refusing petitioner a ballot to vote in the Texas Democratic primary was "state action" within the meaning of the Fourteenth and Fifteenth Amendments to the same extent that the action of the defendants in the *Classic* case was "under color of" state law within the meaning of Section 20 of the United States Code. In the *Classic* case this Court after finding that the Democratic primary in Louisiana was "an integral part of the election machinery" of that state concluded that the election officials who refused to count the ballots of qualified electors in the primary elections were rightfully charged with violation not only of Section 19 of the Criminal Code, prohibiting such action by private individuals, but also Section 20, prohibiting such action by persons acting "under color of" state law. This conclusion was reached by applying the principle that: "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action 'under color of' state law".[1] It has been established in preceding sections of this brief that there is no essential difference between the legal character of the primaries in Louisiana and Texas and that respondent election judges acted "under color of" state law just as did the Louisiana election judges in the *Classic* case (pp. 12-21). Where conduct of the individual is so related to the state as to be "under color of" state law it necessarily follows that such conduct is likewise state action within the meaning of the Fourteenth and Fifteenth Amendments.[2]

The District Court conceded that the right to vote in a primary election which is "by law made an integral part of the election machinery" would be a right protected by the

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[1] 313 U. S. 299, 326.

[2] Cf. *Ex parte Virginia, supra; Home Telephone & Telegraph Co.* v. *Los Angeles, supra; Hague* v. *Committee for Industrial Organization, supra.*

Federal Constitution. The District Judge, however, considered the decision of this Court in *Grovey* v. *Townsend* as controlling and that he must therefore "follow *Grovey* v. *Townsend* and render judgment for defendants" (R. 85). The United States Circuit Court of Appeals also considered the decision in *Grovey* v. *Townsend* as controlling and concluded that "we may not overrule it. On its authority the judgment is affirmed" (R. 151).

In thus following the *Grovey* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between inconsistent methods of determining whether conduct in primary elections is public or private action. It is respectfully submitted that the *ratio decidendi* of the *Classic* case rather than of the *Grovey* case should be followed.

B. New matter disclosed in the present record destroys the factual basis for the decision in *Grovey* v. *Townsend*.

The record before this Court in *Grovey* v. *Townsend, supra,* failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary." That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record.

In *Grovey* v. *Townsend, supra,* this Court decided that the method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grovey v. *Townsend, supra,* was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic Party of Texas and permitted the assumption that the party had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of party membership and restricted to members of an organized voluntary association called the "Democratic Party."[1] The present record and the following analysis will show that these supposed facts, vital to the decision in *Grovey* v. *Townsend, supra,* did not exist.

The problem in *Grovey* v. *Townsend, supra,* as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

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[1] "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary . . ." (295 U. S. 45, 50).

In contrast, the nature, organization and functioning of the Democratic Party were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell* v. *Hill*,[1] that the Democratic Party of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.[2]

This Court was not bound to accept the conclusion of the Supreme Court of Texas as to the legal character of the primary election and the Democratic Party in Texas; for it is well settled that where the claim of a constitutional right is involved, this Court will review the record and find the facts independently of the state court.[3] This Court should

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[1] 123 Tex. 531, 74 S. W. (2d) 113 (1934).

[2] *Bell* v. *Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

[3] In *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Court decided for itself what duties counsel performed, in considering the question of adequate representation by counsel appointed by the state court. In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), the Court made independent findings of fact as to the character of phonograph records played by Jehovah's Witnesses. In *Norris* v. *Alabama*, 294 U. S. 587 (1935), the Court weighed evidence showing that Negroes had been excluded from jury service by reason of race prejudice, against evidence that they had been excluded for other reasons, and held that the former outweighed the latter.

Accord: *Avery* v. *Alabama*, 308 U. S. 444 (1940).

In *Smith* v. *Texas*, 311 U. S. 128, at p. 130 (1940), this Court said:

> "But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment. But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And *it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.*" (Italics supplied.)

Accord: *Ward* v. *Texas*, 316 U. S. 547 (1942).

have reserved to itself the right to pass upon the mixed question of law and fact involved in the decision whether the conduct of primary election officials in Texas constituted state action.[1]

Now, for the first time this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and party in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey* v. *Townsend*, *supra*, an election at which the members of an organized voluntary political association choose their candidates for public office.

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[1] In *Pierre* v. *Louisiana*, 306 U. S. 354, at p. 358 (1939), the Court said:

> "In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

In *Norris* v. *Alabama*, 294 U. S. 587, at p. 590 (1935), Mr. Chief Justice HUGHES, in his opinion for the unanimous Court, said:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Accord: *Great Northern Railway* v. *Washington*, 300 U. S. 154 (1937), *United Gas Co.* v. *Texas*, 303 U. S. 123 (1937). Cf. *Mason Co.* v. *Tax Commission*, 302 U. S. 186 (1937).

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democratic" primary. The testimony of the respondent Allwright is positive on this point.

> "Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.
>
> Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.
>
> Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.
>
> Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.
>
> Q. And you do let them vote? A. Yes" (R. 106).

Second, the Democratic party of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the Democratic party of Texas is not organized. Officials claiming to represent the party testified positively that the party has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic party conventions are preserved (R. 131). The party has no officers between conventions

(R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the Democratic Party and the Democratic primary elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the Democratic Party is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey* v. *Townsend, supra,* compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.88% of all adult citizens of Texas.[1] *Grovey* v. *Townsend* should be overruled.

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[1] United States Census (1940). (Figures include native born and naturalized adult citizens.)

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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